

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

The Federal-State Board On Universal
Service

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CC Docket No. 96-45

INITIAL COMMENTS OF MINNESOTA INDEPENDENT COALITION

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The following Initial Comments are submitted to the Joint Board on behalf of the Minnesota Independent Coalition (the "MIC") in response to the Public Notice released August 17, 2005 (the "*Public Notice*").¹ The MIC is an unincorporated association of over eighty small, Rate-of-Return Incumbent Local Exchange Carriers ("ROR ILECs") providing local exchange service to primarily rural areas in Minnesota. MIC members average approximately 4,800 access lines per company and range from less than 100 to over 40,000 access lines. Fifty percent of the MIC members have fewer than 1,800 access lines. The average number of access lines per exchange for the MIC members is approximately 1,150, and 50% of the exchanges have less than 600 access lines.

The *Public Notice* invited comments on several proposals developed by Joint Board members and staff (collectively the "Proposals"). For the reasons more fully set forth below, the Joint Board should not adopt or recommend any of the Proposals for adoption by the Federal Communications Commission (the "Commission"). The Proposals imply that there is a need to significantly alter rural Universal Service support mechanisms, such as by redefining "Rural Telephone Company," requiring consolidation of multiple study areas in a State, and moving

¹ *Public Notice*, CC Docket No. 96-45 (Released August 17, 2005), FCC 05J-1.

away from embedded costs for calculation of Universal Service support for rural ILECs. Such changes are unwarranted and would likely cause damage to Universal Service in rural areas.

To the extent any changes are warranted, the Commission cannot and should not delegate to the States the Commission's responsibility to establish definitive criteria, standards, and mechanisms to preserve Universal Service, contrary to the recommendations in each of the Proposals.² The Proposals are also premature in that they appear to assume that the Commission decided to make a broad subdelegation of authority to the States in the Intercarrier Compensation ("ICC") reform rulemaking. No such subdelegation has occurred, and it is impossible to meaningfully evaluate the Proposals until the Commission determines the basic parameters of ICC reform. Rather, the public interest is better served if the Joint Board focuses on reform of funding mechanisms, such as eliminating the existing Universal Service funding cap, ensuring appropriate support for broadband in rural areas and establishing a process to accommodate access reform. This focus would provide benefits under both the status quo and ICC reform.

I. THE COMMISSION CANNOT SUBDELEGATE TO THE STATES ITS RESPONSIBILITY TO ESTABLISH DEFINITIVE CRITERIA, STANDARDS, AND MECHANISMS TO PRESERVE UNIVERSAL SERVICE.

The State Commissions can and should play a significant role in assuring the preservation of Universal Service by assisting the Commission with the Federal Universal Service Fund or by implementation of *state mechanisms*. However, the Commission retains the responsibility to

² See, *Public Notice* Appendix A, p. 3 ("Each State commission would be allowed to determine the distribution of its allocation [of Federal universal Service High Cost and Lifeline/Linkup Funds] to [ETCs] in its State."); Appendix B, p. 12 ("This proposal contemplates a "block grant" system similar to the plan proposed in the "State Allocation Mechanism Federal support would be allocated to states, and states would be responsible for distributing funds"); Appendix C, pp. 14-15 (Calling for a State Allocation Mechanism that "would leave the states with more discretion to distribute the funds"); and Appendix D, p. 20 ("State commissions would have what amounts to a power of appointment (or allocation) over federal high-cost funds.")

establish definitive criteria for the *Federal Universal Service Fund* ("Federal USF") to assure consistency and the achievement of the policies reflected in the Act. Contrary to the recommendations in the Proposals, the Commission cannot delegate responsibility for the Federal USF to the States and must assure that there are not 50 different criteria, standards and mechanisms for implementation of the Federal USF.

A. Section 254 Establishes the Roles of the Commission and the States.

The subdelegation of Commission authority over the Federal USF to the States would conflict with the express terms of the Telecommunications Act, which provide for State participation in the Federal USF through a Joint Board, not through a subdelegation by the Commission to individual States. Under § 254, States participate in the establishment of the Federal USF through a Joint Board, which makes recommendations to the Commission, which retains final responsibility to establish the federal USF. Section 254(a)(2) reads in part:

[T]he Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

Section 254(b) also points to State participation through a Joint Board, reading in part:

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

Section 254(c)(1) reads in part:

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically The Joint Board in recommending, and the Commission in establishing, the definition of services that are supported . . . shall consider

Individual States have primary authority in regard to Universal Service only with respect to designation of ETCs (under Section 214) and with respect to establishing *additional*

definitions and standards that the individual States fully fund. Even there, consistency with Commission rules is needed. Section 254(f) reads in part:

A State may adopt regulations *not inconsistent with* the Commission's rules to preserve and advance universal service. ... A State may adopt regulations to provide *additional definitions and standards* to preserve and advance universal service within that State *only to the extent that* such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms. (Emphasis added.)

Section 254 makes it clear that the Commission retains responsibility to establish definitive criteria, standards, and mechanisms for the Federal USF, and that the individual States have primary authority only over additional standards in State Universal Service mechanisms that are fully funded by those individual States.

B. Case Law Precludes the Subdelegation Recommended in the Proposals.

Recent case law precludes the subdelegation by the Commission to the States of authority to establish definitive criteria for the Federal USF. In *USTA v. FCC*³, the Court rejected a delegation of Commission responsibility to State commissions that was very similar to the Proposals. The Court noted that:

[T]he cases recognize an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*. The presumption that subdelegations are valid ... applies only to the former. ... Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.

The fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis.⁴ (Emphasis original)

³ *USTA v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

⁴ *Id.* at 565.

The Court discussed legitimate types of outside party input, including establishing reasonable conditions for Federal approval, fact gathering, and advice giving, but concluded that the subdelegation did not fit these criteria.⁵ The same is true here.

The Proposals suggest that the Commission should subdelegate to the States not simply the responsibility to implement definitive Commission established criteria, but also the authority to determine those definitive criteria constrained by only generalized policy statements by the Commission. For example, Appendix A to the *Public Notice* sets forth a Proposal that: “Each State commission would be allowed to determine the distribution of its allocation [of Federal funding] to [ETCs] in its state. State distributions to ETCs would be subject to FCC guidelines and review to ensure compliance with Section 254”⁶ Similarly, Appendix C proposes the use of “block grants” that “would be administered pursuant to FCC guidelines and with continuing FCC oversight.”⁷ Contrary to that Proposal,⁸ such an approach is not supported by *Qwest v. FCC*.⁹ Rather, such an approach was rejected in *Qwest v. FCC* and would be rejected here as well.

In *Qwest v. FCC*, the Court noted that: “The Telecommunications Act plainly contemplates a partnership between the federal and state governments to support universal service.”¹⁰ The Court also stated that:

The FCC acknowledges that the Ninth Order will result in reasonably comparable rates only *if the states implement their own* universal-service policies. ... As noted above, the Act requires the FCC to base its policies on the principle that

⁵ *Id.* at 566-568.

⁶ *Public Notice* at p. 3.

⁷ *Id.* at 15.

⁸ *Id.*

⁹ *Qwest Corporation v. Federal Communications Commission*, 258 F.3d 1191 (10th Cir. 2001).

¹⁰ *Id.* at 1203.

there *should be sufficient state mechanisms* to promote universal service.¹¹
(Emphasis added.)

However, there was no support for subdelegation of authority over the Federal USF mechanism. Further, in *USTA v. FCC*, the “state commissions’ independent jurisdiction over the general subject matter, the magnitude of the regulatory task, and the need for close cooperation between state and federal regulators”¹² were insufficient to support the proposed subdelegation from the Commission to the States. The same is true here.

C. The Need for Consistency and Predictability Also Preclude Subdelegation.

Practical considerations also require that the Commission establish a nation-wide plan, including the development and implementation of definitive criteria, standards, and mechanisms. There are numerous practical obstacles that prevent reliance on individual States to both develop and implement such criteria and mechanisms, which are troublesome in the context of development of State mechanisms and would be intolerable in the context of interference with the Federal USF.

Some State commissions lack the legislative authority needed to develop Universal Service criteria, standards, and mechanisms. Other State commissions lack the authority over certain categories of recipients of Universal Service funding or may have varying levels of authority. In particular, many State commissions lack any authority over CMRS providers. Other State commissions may have varying levels of authority and multiple regulatory patterns applicable to the ILECs and CLECs doing business in their States, which may also impede State

¹¹ *Id.*

¹² *USTA v. FCC*, 359 F.3d at 565.

commission implementation of a Commission policy.¹³ Some ILECs are also subject to State obligations, often in connection with alternative forms of state regulation, that preclude the ILECs from initiating increases in local charges for varying periods of time.¹⁴

Implementation of a new Universal Service regime is likely to be a highly sensitive public policy issue. This fact is likely to make consistency between States virtually impossible to achieve and is almost certain to create substantial delays. Multiple legislative, regulatory, and legal contests would undoubtedly result, leading to fragmentation and/or grid-lock of the efforts to implement a new Universal Service regime. Other State commissions may disagree with the policy decisions made by the Commission and may, accordingly, not be inclined to cooperatively implement policies that are only generally described. While some may argue that such results would be the sole responsibility of the States and should not be a source of concern to the Commission, the chaotic results that follow would impede implementation of the Commission's decision, prevent needed investment, and be ultimately self defeating.

State commissions are also unlikely to agree on subjective criteria to determine "need" for Federal Universal Service support that appear to be included in some of the Proposals. At least one of the Proposals appears to involve individual company-by-company earnings reviews at the discretion of the State commissions.¹⁵ Consistency would be virtually impossible to achieve in such a process.

¹³ In Minnesota, there are distinctions between the Minnesota Public Utilities Commission authority over "independent telephone companies" (i.e., ROR ILECs) and larger ILECs and between member of those categories (based on whether the ILECs are subject to "alternative forms of regulation" [i.e., price-cap]) and Competitive Local Exchange Carriers.

¹⁴ E.g., Minn. Stat. §§ 237.76-769 and 237.774.

¹⁵ *Public Notice* at p. 15.

All of these factors raise the risk of contentious political, regulatory and legal contests in multiple States, with virtually no prospects for consistent implementation, much less predictable support. The legal and public policy problems and complexities posed by delayed and inconsistent results in 50 States must be prevented by the establishment of definitive criteria, standards, and mechanisms by the Commission.

A nationwide plan is needed for *predictability*, both for carriers doing business in multiple States and for carriers doing business in only one State. For carriers doing business in multiple States, the risk of inconsistent decisions will be applied to very substantial revenue sources. That risk would severely curtail investments since the carriers would know that a change in the administration of a State commission could significantly alter the availability of support needed to fund long term investments.

Carriers doing business in only one State will experience the same type of uncertainty, even if they do not risk inconsistency between different jurisdictions. Predictability and reasonable certainty are essential to promote long-run investing in the rural, high cost areas served by ROR ILECs. The required level of predictability and certainty can result only from a nationwide plan with definitive criteria, standards, and mechanisms for application.

II. THE PROPOSALS ARE PREMATURE.

The Proposals all appear to assume that the Commission has generally accepted the idea that existing rural Universal Service support mechanisms need to be significantly changed (with the details of such changes to be largely delegated to the States), and the recommendation made by NARUC in its comments and *ex parte* presentations for a State Access Mechanism ("SAM") in the Inter-carrier Compensation ("ICC") reform proceeding. To the contrary, the Commission

has not determined that significant changes to existing rural Universal Service support mechanisms are warranted, or taken any action with respect to the various proposals for ICC reform. Further, until the Commission does indicate a direction in the ICC reform proceeding, radical proposals for reform of the Universal Service mechanism are premature because the implications of the Proposals cannot be determined.

Until that Commission establishes a general direction in the ICC reform proceeding, it is impossible to make even a high level approximation of the consequences of the Proposals in this proceeding, because it is impossible to tell what the scope of support funding will be and the basis on which that funding will be made available. Even the basic elements of timing and scope of ICC are unknown. The impacts of these issues on the need for support funding are direct and substantial. Until these factors are known, the implications of the Proposals can not be known.

III. THE PUBLIC INTEREST IS BETTER SERVED BY A FOCUS ON REFORM OF FUNDING MECHANISMS, ESTABLISHING A PROCESS TO ACCOMMODATE ACCESS REFORM, AND REFINING EXISTING RURAL UNIVERSAL SERVICE SUPPORT MECHANISMS.

Although consideration of the Proposals is premature in this proceeding, there are useful steps that can be taken that will be helpful in the context of both the status quo and virtually any decision that may result from the ICC proceeding. More specifically, the Joint Board should recommend that the Commission: (a) eliminate the existing USF cap; (b) broaden and stabilize the base for contributions to the existing USF rules on the same basis as the new ICC restructuring mechanism (e.g., numbers or connections used, etc.); and (c) take steps to ensure appropriate support for broadband in rural areas. The support mechanisms needed to accommodate ICC reform will require development as the ICC reform proceeding continues.

Currently, contributions to the USF are based on interstate revenues only. Using revenues as the basis for determining support levels is unsustainable because interstate revenues are declining, and the jurisdictional identification of revenues is too easy to manipulate and too difficult to enforce, creating unequal burdens between carriers. Therefore, a broader, more uniform basis for determining support obligation is needed. All carriers that use and benefit from the ILEC networks must provide Universal Service funding support. That means that Internet Service Providers, which terminate traffic over the Public Switched Telecommunications Network, should also contribute to Universal Service funding support.

For the reasons set forth above, the Joint Board should not take further action with respect to the Proposals and should, instead, take steps to address funding sources, establish new support mechanisms to facilitate Access Reform, and make needed refinements to existing rural Universal Service support mechanisms to restore rural Universal Service support to levels it would be at without existing caps and, thereby, insure the benefits of state of the art communications, including broadband access, to areas served by rural LECs.

MINNESOTA INDEPENDENT COALITION

Initial Comments of Minnesota Independent Coalition
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